(1)

SHDKT PROCEEDINGS AND ORDERS DATE: [01/17/96]

CASE NBR: [94108988] CFY STATUS: [DECIDED]
SHORT TITLE: [Stutson, Anthony Leo]
VERSUS [United States] DATE DOCKETED: [042495]
PAGE: [01]

~~~~~~~~DATE~~~~NOTE~~~~~~~~~~~~~~~~~~~~PROCEEDINGS & ORDERS~~~~~~~~~~~~~~~~~~~~~~

1	Apr 24 1995	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	May 26 1995		Order extending time to file response to petition until July 3, 1995.
5	Jun 30 1995		Brief of respondent United States filed.
6	Jul 6 1995		DISTRIBUTED. September 26, 1995 (Page 30)
8	Oct 2 1995		REDISTRIBUTED. October 6, 1995 (Page 23)
10	Oct 10 1995		REDISTRIBUTED. October 13, 1995 (Page 13)
12	Oct 23 1995		REDISTRIBUTED. October 27, 1995 (Page 21)
13	Oct 30 1995		REDISTRIBUTED. November 3, 1995 (Page 12)
15	Nov 6 1995		REDISTRIBUTED. November 9, 1995 (Page 13)
17	Nov 17 1995		REDISTRIBUTED. November 22, 1995 (Page 26)
19	Nov 27 1995		REDISTRIBUTED. December 1, 1995 (Page 19)
21	Dec 4 1995		REDISTRIBUTED. December 8, 1995 (Page 13)
23	Jan 2 1996		REDISTRIBUTED. January 5, 1996 (Page 41)

Last page of docket

SHDKT PROCEEDINGS AND ORDERS DATE: [01/17/96]

CASE NBR: [94108988] CFY STATUS: [DECIDED]
SHORT TITLE: [Stutson, Anthony Leo]
VERSUS [United States] DATE DOCKETED: [042495]
PAGE: [02]

~~~~~~~~DATE~~~~NOTE~~~~~~~~~~~~~~~~~~~~PROCEEDINGS & ORDERS~~~~~~~~~~~~~~~~~~~~~~

26	Jan 8 1996		Petition GRANTED. Judgment VACATED and case REMANDED Concurring opinion by Justice Stevens. Opinion concurring and dissenting by the Chief Justice. Dissenting opinion by Justice Scalia with whom Justice Thomas joins. Opinion per curiam.

****

1PP

(2)

94-8988

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ANTHONY LEO STUTSON

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT.

Supreme Court,
FILE
APR 2 4 19
OFFICE OF THE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SUSAN G. JAMES
ATTORNEY FOR PETITIONER
600 S. MCDONOUGH STREET
MONTGOMERY, AL 36104
334/269-3330

20 pp

RECEIVED

QUESTION PRESENTED

Whether the reasoning and ultimate result reached by this Court in Pioneer Investment Services Co. v. Brunswick Associates ___ U.S. ___, 113 S.Ct. 1489, 123 L.Ed. 2d 74 (1993) should be adopted and applied in criminal cases.

THE PARTIES

The caption in this case contains the name of all parties.

TABLE OF CONTENTS

QUESTION PRESENTED	ii
THE PARTIES	iii
TABLE OF CONTENTS AND AUTHORITIES	iv
OPINIONS AND ORDERS BELOW	1
JURISDICTION	3
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
ARGUMENT	6
CONCLUSION	15
APPENDIX	16

A. OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ON APPLICATION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

B. OPINION OF THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT

C. APRIL 16, 1993, ORDER OF THE DISTRICT COURT

D. GOVERNMENT'S RESPONSE TO MOTION FOR EXCUSABLE NEGLECT

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATUTES

CASES

Fallen v. United States, 378 U.S. 139, 84 S. Ct. 1689, 12 L. Ed. 2d 760 (1964) .. p. 9, 12

Halfen v. United States, 324 F.2d 52 (10th Cir. 1963) .. p. 15

In re. Mutual Leasing Corp., 424 F. 2d 999 (Cir. 1970) .. p. 9, 15

Pioneer Investment Services Co. v. Brunswick Associates ___ U.S.___, 113 S.Ct. 1489, 123 L.Ed. 2d 74 (1993) .. p. 2, 9, 12, 15

Sanchez v. Board of Regents of Texas Southern University, 625 F. 2d 521 (5th Cir. 1980) .. p. 8, 15

Wright v. Deyton, 757 F.2d 1253 (11th Cir. 1985).. p. 8, 9, 14

Tarabishi v. McAlester Regional Hospital, 951 F.2d 1558 (10th Cir. 1991).. p. 11

U.S. v. Hooper, 9 F. 3rd 257 (2nd Cir. 1993).. p. 14

United States v. Reyes, 759 F.2d 351 (4th Cir. 1985) .. p. 14

United States v. Twomey, 845 F.2d 1132 (1st Cir. 1988).. p. 13

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ANTHONY LEO STUTSON,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REFERENCE TO OPINIONS DELIVERED BELOW

1. A Petition for Rehearing/Suggestion for Rehearing En Banc was filed and a subsequent denial of consideration issued on January 24, 1995. (See Appendix A).

2. The Eleventh Circuit affirmed the District Court's finding in its opinion of September 9, 1994. (See Appendix B).

3. The April 16, 1993, Order of the District Court ruled that sufficient excusable neglect did not exist. (See Appendix C).

JURISDICTION

On September 9, 1994, the United States Court of Appeals for the Eleventh Circuit affirmed the Order of the United States District Court for the Northern District of Alabama. On January 24, 1995, the United States Court of Appeals denied the Petition for Rehearing and Suggestion for Rehearing En Banc.

This Petition is filed within 90 days of said date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1) and Rule 13, Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

STATUTORY PROVISIONS INVOLVED

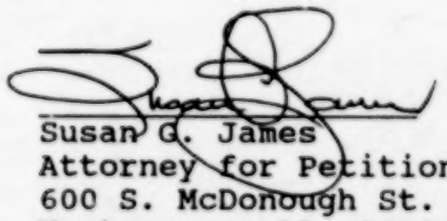
STATEMENT OF THE CASE

Petitioner, Anthony Leo Stutson, was sentenced on July 21, 1992, in the United States District Court for the Northern District of Alabama. He was sentenced to a term of 292 months pursuant to the Sentencing Reform Act of 1984.

Petitioner's counsel mailed, via United States Postal Service, his Notice of Appeal and filing fee on July 30, 1992. This Notice was inadvertently mailed by a staff member to the Eleventh Circuit Court of Appeals in Atlanta rather than the District Court for the Northern District of Alabama. The Notice of Appeal was received by the Eleventh Circuit Court of Appeals on August 3, 1992. This misdirection caused the Notice of Appeal to be filed outside the ten days required by Rule 4 of the Federal Rules of Appellate Procedure.

After receiving the misdirected Notice of

Appeal, the Eleventh Circuit forwarded the Notice of Appeal to the District Court which filed it on August 5, 1992. The Eleventh Circuit notified Counsel on September 16, 1992, of the untimely filing and considered the untimely Notice of Appeal as a motion for extension of time within which to file an appeal and remanded it to the United States District Court for the Northern District of Alabama for a determination of excusable neglect. The District Court found no excusable neglect. The appeal was subsequently dismissed.



Susan G. James
Attorney for Petitioner
600 S. McDonough St.
Montgomery, AL 36104
334/269-3330

ARGUMENT

The Eleventh Circuit has refused to accept the admission of a careless mistake wherein a Notice of Appeal was misdirected to the Eleventh Circuit Court of Appeals rather than the Northern District of Alabama as sufficient excusable neglect.

Due to this error, the Notice of Appeal was untimely filed on August 5, 1992, in lieu of the filing deadline of July 31, 1992. Counsel mailed the Notice on July 30, 1992. Prior to mailing Counsel contacted the United States Postal Service to insure that the Notice would arrive in Birmingham on July 31, 1992 (the Northern District of Alabama) and, therefore, be filed timely. The Postal Service informed Counsel that it would be delivered and received if mailed by way of First Class postage within one day's time. If

there had been any question about the certainty of receipt and therefore filing by the District Court, Counsel would have mailed the Notice by way of one of the express overnight delivery services.

There was no communication with either the District Court or the Eleventh Circuit until September 16, 1992, when the Clerk for the Eleventh Circuit notified Counsel of the untimeliness of the Notice of Appeal and requested jurisdiction briefs in the matter.

Counsel for Petitioner did everything within Counsel's power to pre-determine the timeliness of receipt/filing of the Notice of Appeal. The District Court held that Counsel should not sit idly by and watch the deadline for appeal approach and then establish excusable neglect by showing untimely delivery of an out-of-town mailing by ordinary mail of the Notice of Appeal the day before the time

for appeal would expire citing Wright v. Deyton, 757 F.2d 1253 (11th Cir. 1985).

Federal Rules of Appellate Procedure Three and Four govern notices of appeal. Rule 4(b) gives a ten-day time limit in which to file the Notice of Appeal in criminal cases. Counsel for Petitioner was operating within the proper time frame for timely filing, but for the mistake of the misdirection which remained unknown to Counsel until September 16, 1992, the Notice would have been filed timely. Counsel requested that the Court reconsider the matter and allow out of time filing.

Reliance on the normal course of delivery of mail is reasonable and, therefore, may be the basis for a court to excuse an otherwise untimely filing of a Notice of Appeal. Sanchez v. Board of Regents of Texas Southern University, 625 F. 2d 521 (5th Cir. 1980); see

also Fallen v. United States, 378 U.S. 139, 84 S. Ct. 1689, 12 L. Ed. 2d 760 (1964); In re. Mutual Leasing Corp., 424 F. 2d 999 (Cir. 1970).

Respectfully, considering the proposition that the District Court supposed and cited Wright v. Deyton, 757 F.2d 1253 (11th Cir. 1985) and equating this alleged behavior as with inadvertence, mistake or carelessness, the notice must be considered and accepted. In a recent case Pioneer Investment Services Company v. Brunswick Associates, ___ U.S. ___, 113 S. Ct. 1489 (1993), this Court addressed the late filing of a proof of claim in a Chapter 11 Bankruptcy. The District Court denied the motion for the extension of time within which to file. The Sixth Circuit reversed and remanded the decision, and the Supreme Court determined on petition for certiorari, that a late filing would be

accepted where the failure to act is caused by inadvertence, mistake or carelessness, or by intervening circumstances beyond a party's control.

In determining whether an attorney's carelessness is excusable, the Court must take into account four factors; 1) the danger of prejudice to the opposing party; 2) the length of the delay and its potential impact on judicial proceedings; 3) the reason for the delay, including whether it was within the reasonable control of the movant; and 4) whether the movant acted in good faith.

In the case sub judice, analyzing the four factors, there would be no undue prejudice to the opposing party if the appeal were reinstated. Although there has been a delay it has not had sufficient impact on the proceedings because the proceedings had been instituted and all necessary documents

prepared when the notice of the untimely filing was given. Furthermore, the United States Attorney did not object to an extension of time within which to file but deferred to the District Court. (See Appendix D). The mistake and carelessness of counsel's staff member, which counsel ultimately bears responsibility for, which resulted in this outcome, was basically outside counsel's control. The staff member was told to mail it to the District Court. Counsel did not know that it did not, in fact, go to the District Court until later, and counsel acted diligently and in good faith. See also U.S. v. Hooper, 9 F. 3rd 257 (2nd Cir. 1993).

Counsel accepts the responsibility for abiding correctly by procedural rules established by the courts; however, counsel must insist that but for the misdirected notice it would have been timely filed with

the District Court and, therefore, would have been proper. Counsel assures this Court that Counsel's staff is instructed that the Notice of Appeal is always mailed to the District Court. A careless mistake was made. However, counsel feels that good cause has been demonstrated for relief. Denial will result in a substantial hardship to Petitioner particularly in light of his having a 292 month sentence. Further, judicial economy favors resolution of his appeal issues now as opposed to later in a 2255 pleading or an ineffective assistance of counsel claim. Also, nothing in Pioneer, supra, limits the Court's interpretation of "excusable neglect" to Bankruptcy rules.

In Fallen v. United States, 378 U.S. 139, 84 S.Ct. 1689, 12 L.Ed 760 (1964), this court established guidelines for determining the outcome in cases such as this. The court

stated that an inquiry should focus on two distinct periods.

> " First, the district court should examine the pre-mailing delay to see if there is something akin to 'excusable neglect' or 'good cause' which excuses the delay. Second, the district court should determine when the document was mailed and whether, in the ordinary course of events, the clerk would have received the [notice] by the applicable filing deadline." (Emphasis added.)

In the instant case, the case was docketed at the District Court on August 5, 1992, five days beyond the ten-day time limit, yet within the thirty-day period allowed for consideration as a motion for extension of time within which to file. Not until September 16, 1992, did counsel discover the untimeliness of the filing after receipt of a letter from the Eleventh Circuit. Timely responses have been made and received since the initial untimely filing.

Other circuits have determined that

excusable neglect existed where the Notice of Appeal was timely mailed but arrived late. See Tarabishi v. McAlester Regional Hospital, 951 F.2d 1558 (10th Cir. 1991); or see United States v. Twomey, 845 F.2d 1132 (1st Cir. 1988), excusable neglect existed where the Notice of Appeal was mailed prior to the deadline for filing but arrived after the deadline when the attorney was only blocks away and could have hand delivered the Notice to the Court; or see United States v. Reyes, 759 F.2d 351 (4th Cir. 1985), where the court and attorney were housed in the same building.

Counsel for Appellant respectfully reminds the Court that the Advisory Committee Comments to F.R.A.P. 3 states that Rules Three and Four should be interpreted in accordance with those cases dispensing with "literal compliance in cases in which it cannot fairly be exacted." Wright v. Deyton, 757 F.2d 1253

(11th Cir. 1985); Halfen v. United States, 324 F.2d 52 (10th Cir. 1963). Sanchez v. Board of Regents of Texas Southern University, 625 F.2d 521 (5th Cir. 1980); and In re Mutual Leasing Corp., 424 F.2d 999 (5th Cir. 1970), excusable neglect existed where a notice mailed to a district court which would have been received by the court in the normal course of time was held sufficient.

CONCLUSION

Petitioner urges the Court to create uniformity of application of excusable neglect by applying the rationale utilized in Pioneer, supra, to criminal cases. The impact of the Circuit Court's affirmance, under the facts of this case, sadly suggests that civil litigants are given far greater deference by the courts than in this case where a criminal defendant is deprived of his liberty for over 24 years.

APPENDIX A

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
JAN 24, 1995

MIGUEL J. CORTEZ
CLERK

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 93-6339

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTHONY LEO STUTSON,
a/k/a "Mookie"

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Alabama

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: HATCHETT, EDMONDSON, & COX, Circuit Judges.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

signed
United States Circuit Judge

ORD-42
(9/91)

APPENDIX B

FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT
SEP 9, 1994, Miguel J. Cortez, Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 93-6339

D. C. Docket No. 92-00094-CR-H-S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTHONY LEO STUTSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

Before HATCHETT, EDMONDSON, and COX, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREFOR, it is now hereby ordered and adjudged by ;this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED.

Entered: September 9, 1994
For the Court: Miguel J. Cortez, Clerk

By: Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 2-14-95

Judgment Entered: July 5, 1991
By the Court: Miguel J. Cortez, Clerk

By: /s/ David Malaud
Deputy Clerk

ISSUED AS MANDATE: OCT 11 1991

APPENDIX C

FILED 93 APR AH 8:17 U.S. DISTRICT COURT N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA,)

VS.) CR92-H-94-S

ANTHONY L. STUTSON A/K/A MOOKIE)

ENTERED APR 16, 1993

ORDER

This matter is before this court under the February 25, 1993 order of remand from the United States Court of Appeals for the Eleventh Circuit for a determination of whether there is excusable neglect for the failure of appellant timely to file his notice of appeal. Following the entry of such remand, the court entered an order on March 3, 1993 directing counsel for defendant to file by March 25, 1993 with the court such verified evidence and legal argument as counsel desired to present in connection with the issue thus

presented. Counsel for the government was given until April 14, 1993 to respond. The matter is now before the court for its findings of fact and conclusions of law.

While the submission by counsel for defendant is not in verified form, the court accepts as true every factual statement therein contained. Based thereon and on the court file, the court makes the following findings and reaches the following conclusions. On July 21, 1992 defendant was sentenced in this court and judgment entered. Defendant's last day for filing a notice of appeal was Friday, July 31, 1992. Counsel for defendant has a significant nationwide appellate practice and is familiar with the rules governing appeals. Counsel is therefore aware of the importance of filing a notice of appeal within ten days of July 21, 1992. On Thursday, July 30, 1992, counsel signed and

mailed from Montgomery a notice of appeal. The notice of appeal was misdirected to the Court of Appeals in Atlanta rather than to the district court in Birmingham. This misdirection occurred as a result of an error by a substitute staff member in counsel's office. The notice of appeal was received on Monday, August 3, 1992 in Atlanta, at which time the appeal was "filed." There is no showing, however, as to why the notice of appeal was not mailed prior to that ninth day. Nor is there any showing that the normal course of mail delivery should have resulted in the notice of appeal arriving in Birmingham on July 31, 1992 with its direction to Atlanta. This court cannot assume that the ordinary course of the regular mail will result in a letter mailed in Montgomery on July 30, 1992 arriving in Birmingham on or in Atlanta July 31, 1992. Neither can counsel

for defendant. Certainly there is no evidence to support such an assumption. Further, there is no showing that counsel utilized upgraded mail service, such as overnight delivery, or inquired on Friday, July 31, 1992 with the clerk's office (in Birmingham or in Atlanta) to determine whether the notice of appeal had been received. An attorney for an appellant cannot sit idly by and watch the deadline for appeal approach and then establish excusable neglect by showing untimely delivery of an out-of-town mailing by ordinary mail of the notice of appeal the day before the time for appeal would expire. Wright v. Deyton, 757 F.2d 1253 (11th Cir. 1985). Counsel for defendant has simply failed to present sufficient evidence or argument to establish excusable neglect under F.R.Cr.P. Rule 4(b). The "motion" of defendant for an extension of time for filing a notice of appeal is

therefore DENIED.

The clerk of court is directed to supplement the record on appeal with a copy of this order, the March 3, 1993 order, the March 25, 1993 motion of defendant with its attachments and a copy of the April 14, 1993 response of the government.

DONE this 16th day of April, 1993.

James H. Hancock
United States District Judge

APPENDIX D

FILED 93 APR 14 PM 2:42 U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALABAMA

SOUTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	NO. 92-H-0094-S
	)	
ANTHONY LEO STUTSON a/k/a "MOOKIE"	)	

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO ESTABLISH EXCUSABLE NEGLECT

Comes now the United States of America, by and through its attorneys, Jack W. Seldon, United States Attorney for the Northern District of Alabama, and responds to defendant's Motion to Establish Excusable Neglect in the above-styled case as follows:

The government defers to the sound discretion of the Court in the resolution of this matter.

Respectfully submitted this 14th day of April 1993.

JACK W. SELDEN
United States Attorney

signed
ROBERT J.MCLEAN
Assistant United States Attorney

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served on the defendant by mailing a copy of same by First Class, United States mail, postage prepaid, this the 14th day of April 1993, to his attorney of record:

Susan G. James
Attorney at Law
600 S. McDonough Street
Montgomery, Alabama 36104

signed

ROBERT J. MCLEAN
Assistant United States Attorney

ORIGINAL

No. 94-8988

Supreme Court, U.S.
FILED
JUN 30 1995
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ANTHONY LEO STUTSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's claim that the late filing of his notice of appeal was due to "excusable neglect" under Federal Rule of Appellate Procedure 4(b) should be remanded for application of the excusable-neglect standard as this Court interpreted it in Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 113 S. Ct. 1489 (1993).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 94-8988

ANTHONY LEO STUTSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 20-21) is not reported, but the judgment is noted at 36 F.3d 94 (Table). The order of the district court (Pet. App. 23-27) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1994. A petition for rehearing was denied on January 24, 1995 (Pet. App. 17-18). The petition for a writ of certiorari was filed on April 24, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Northern District of Alabama to one count of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1).[1/] He was sentenced to 292 months' imprisonment. After his lawyer filed a late notice of appeal on his behalf, the court of appeals remanded the case to allow the district court to determine whether the delay was caused by excusable neglect. After this Court's decision in Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 113 S. Ct. 1489 (1993), but without reference to that decision, the district court found no excusable neglect. Pet. App. 23-27. By judgment order, the court of appeals affirmed. Id. at 20-21.

1. After petitioner's July 21, 1992, sentencing, petitioner's counsel prepared a notice of appeal. That notice was due to be filed on or before Friday, July 31, 1992. On Thursday, July 30, petitioner's lawyer signed a notice of appeal and directed her staff to mail it from Montgomery, Alabama, to the district court in Birmingham, Alabama. However, a substitute staff member in the lawyer's office mailed the notice of appeal to the court of appeals rather than to the district court. The court of appeals received the notice of appeal on Monday, August 3, 1992. Pet. App. 24-25.

[1/] Two other such counts were dismissed as part of petitioner's plea.

The court of appeals docketed the appeal but remanded the case to the district court for a determination whether the failure timely to file the notice of appeal was the result of "excusable neglect" under Federal Rule of Appellate Procedure 4(b). On remand, the district court requested verified evidence and arguments from the parties on the reasons for the late filing. Petitioner's brief was due by March 25, 1993, and the United States' brief was due by April 14, 1993. Pet. App. 23-24.

On March 24, 1993, shortly before the briefs were filed, this Court decided Pioneer Investment. That decision interpreted the "excusable neglect" standard in Bankruptcy Rule 9006(b)(1), governing allowance of late filings in the bankruptcy courts, as not limited to circumstances beyond counsel's control. Pioneer Investment thus authorizes courts applying an excusable-neglect standard, "where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." 113 S. Ct. at 1495. Neither party's brief in the district court, however, addressed the potential applicability of Pioneer Investment in this case. See Pet. App. 29-30.

On April 16, 1993, without reference to Pioneer Investments, the district court found no excusable neglect. Pet. App. 23-27. Although the factual statements in petitioner's counsel's brief were not in verified form, the district court accepted them as true. Id. at 24. The court found, however, that petitioner's lawyer did not show why the notice of appeal was not mailed until

the ninth day after final judgment was entered. Id. at 25. The district court also found that there was no showing that, if the notice of appeal had been correctly addressed, regular mail service would have delivered the notice of appeal to the district court in Birmingham on July 31, one day after it was mailed in Montgomery. Ibid.

2. On appeal, petitioner contended that the district court's decision was in error in light of Pioneer Investment. The United States responded that Pioneer Investment, which addressed the excusable-neglect standard in the context of the Bankruptcy Rules, was inapplicable in assessing excusable neglect under Federal Rule of Appellate Procedure 4(b). Gov't C.A. Br. at 11. In a judgment order making no reference to Pioneer Investment, the court of appeals affirmed.

ARGUMENT

Petitioner contends (Pet. 6-15) that the courts below erred in not assessing his claim under the excusable neglect standard enunciated in Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 113 S. Ct. 1489 (1993), and we agree. In Pioneer Investment, this Court held that excusable neglect under Bankruptcy Rule 9006(b)(1), governing late proofs of claim, is not "limited strictly to omissions caused by circumstances beyond the control of the movant." 113 S. Ct. at 1496.[1/] Rather, excusable neglect encompasses "both simple,

---

[1/] Bankruptcy Rule 9006(b)(1) provides that, "when an act is required or allowed to be done within a specified period by (continued...)

faultless omissions to act and, more commonly, omissions caused by carelessness." Id. at 1495. The excusable neglect standard thus authorizes courts, "where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." Ibid. The determination whether a party's neglect is excusable is an equitable one, and should take account of "all relevant circumstances," including "the danger of prejudice to the [non-movant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." Id. at 1498.

Although Pioneer Investment arose in the context of a dispute over the correct interpretation of Bankruptcy Rule 9006(b)(1), it is equally applicable to other federal rules employing the excusable-neglect standard, including Federal Rule of Appellate Procedure 4(b), which governs the late filing of the notice of appeal in this case. Rule 4(b) provides that, where a defendant's notice of appeal in a criminal case is not filed within the required 10-day period, "[u]pon a showing of excusable neglect [the district court may * * * extend the time for filing a notice of appeal * * *." Since this Court's decision in Pioneer

---

[1/](...continued)
these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time within its discretion * * * on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect."

Investment, each of the courts of appeals that has expressly addressed the question has held the Pioneer Investment excusable-neglect standard applicable to determinations whether to extend time for filing notices of appeal under Fed. R. App. P. 4. See United States v. Clark, 51 F.3d 42, 43-44 (5th Cir. 1995) (applying Pioneer Investment to determination under Fed. R. App. P. 4(b)); United States v. Hooper, 9 F.3d 257, 259 (2d Cir. 1993) (same); Reynolds v. Wagner, No. 93-56629, 1995 WL 320020 *3-*4 (9th Cir. May 26, 1995) (applying Pioneer Investment to determination under Fed. R. App. P. 4(a)(5))[1]; City of Chanute v. Williams Natural Gas Co., 31 F.3d 1041, 1045-1046 (10th Cir. 1994), cert. denied, 115 S. Ct. 1254 (1995) (same); Weinstock v. Cleary, Gottlieb, Steen & Hamilton, 16 F.3d 501, 503 (2d Cir. 1994) (same).

The Eleventh Circuit's failure to apply Pioneer Investment in this case is thus contrary to the uniform course of decisions in the other courts of appeals. The district court did not consider petitioner's excusable-neglect claim under the Pioneer Investment standard, and the court of appeals summarily affirmed without reference to Pioneer Investment. Given the unanimity of the other courts of appeals' interpretation of the "excusable neglect" standard of Fed. R. App. P. 4 in accordance with Pioneer Investment, we believe it would be appropriate to vacate the

---

[1] Like Fed. R. App. P. 4(b) in the criminal context, Rule 4(a)(5) authorizes the district court to allow a late notice of appeal in a civil case "upon a showing of excusable neglect."

decision below and remand this case for reconsideration in light of Pioneer Investment.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded for reconsideration in light of Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 113 S. Ct. 1489 (1993).

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

LOUIS M. FISCHER
Attorney

JUNE 1995

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

STUTSON, ANTHONY LEO Petitioner	)	
vs.	)	No. 94-8988
USA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES** by first class mail, postage prepaid, on this 30th day of June 1995.

SUSAN G. JAMES
600 S. MCDONOUGH STREET
MONTGOMERY, AL 36104

Drew S. Days, III

DREW S. DAYS, III
Solicitor General

June 30, 1995

RECEIVED
HAND DELIVERED
JUN 30 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

ANTHONY LEO STUTSON

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 94–8988. Decided January 8, 1996

PER CURIAM.

Our *per curiam* opinion issued today in a civil case, *Lawrence* v. *Chater*, No. 94–9323, contains a general discussion of the considerations which properly influence this Court in deciding whether to grant a petition for certiorari, vacate the judgment below, and remand the case (GVR) for further consideration in light of potentially pertinent matters which it appears that the lower court may not have considered. Here, we apply that analysis to a criminal case, again finding that the particularities of the case before us merit a GVR.

Stutson, the petitioner in this case, is currently serving a federal prison sentence of 292 months for cocaine possession. He has had no appellate review of his legal arguments against conviction and sentence. The District Court held that his appeal was untimely and that the untimeliness was not the result of "excusable neglect" within the meaning of Rule 4(b) of the Federal Rules of Appellate Procedure, because his lawyer's office mailed his notice of appeal so that it arrived one working day late for the 10-day deadline, and at the Court of Appeals, when it should have been sent to the District Court. The District Court's opinion did not advert to our decision in *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 507 U. S. 380 (1993), rendered one day before Stutson's

5 pp

brief was due in the District Court and not cited in the briefs before that court. In *Pioneer*, we held that a party could in some circumstances rely on his attorney's inadvertent failure to file a proof of claim in a timely manner in bankruptcy proceedings as "excusable neglect" under the bankruptcy rules.

Stutson appealed the District Court's ruling. In their briefs to the Court of Appeals for the Eleventh Circuit, the parties disputed the applicability of *Pioneer*'s liberal understanding of "excusable neglect" to the Rule 4(b) criminal appeal context, the Government contending that it applied only in bankruptcy cases. The Court of Appeals affirmed the District Court and dismissed Stutson's appeal without hearing oral argument or writing an opinion. Now, in his response to Stutson's petition for certiorari, the Solicitor General has reversed the Government's position. This change of position follows the unanimous view of the six Courts of Appeals that, unlike the Eleventh Circuit in this case, have expressly addressed this new and important issue, and have held that the *Pioneer* standard applies in Rule 4 cases. See *United States* v. *Clark*, 51 F. 3d 42, 44 (CA5 1995) (Rule 4(b)); *United States* v. *Hooper*, 9 F. 3d 257, 259 (CA2 1993) (same); *Chanute* v. *Williams Natural Gas Co.*, 31 F. 3d 1041, 1045–1046 (CA10 1994) (Rule 4(a)(5)), cert. denied, 513 U. S. ___ (1995); *Fink* v. *Union Central Life Ins. Co.*, 65 F. 3d 722 (CA8 1995) (same); *Reynolds* v. *Wagner*, 55 F. 3d 1426, 1429 (CA9) (same), cert. denied, 516 U. S. ___ (1995); *Virella-Nieves* v. *Briggs & Stratton Corp.*, 53 F. 3d 451, 454, n. 3 (CA1 1995) (same).*

In sum, this is a case where (1) the prevailing party below, the Government, has now repudiated the legal

**Clark, Fink, Reynolds* and *Virella-Nieves* were decided after the Court of Appeals in this case denied Stutson's petition for rehearing. *Chanute* and *Hooper* were decided after the District Court's decision in this case but before that of the Court of Appeals.

position that it advanced below; (2) the only opinion below did not consider the import of a recent Supreme Court precedent which both parties now agree applies; (3) the Court of Appeals summarily affirmed that decision; (4) all six Courts of Appeals that have addressed the applicability of the Supreme Court decision that the District Court did not apply in this case have concluded that it applies to Rule 4 cases; and (5) the petitioner is in jail having, through no fault of his own, had no plenary consideration of his appeal. While "we 'should [not] mechanically accept any suggestion from the Solicitor General that a decision rendered in favor of the Government by a United States Court of Appeals was in error,'" *Lawrence, ante*, at 7 (quoting *Mariscal* v. *United States*, 449 U. S. 405, 406 (1981) (REHNQUIST, J., dissenting)), this exceptional combination of circumstances presents ample justification for a GVR order. It appears to us that there is at least a reasonable probability that the Court of Appeals will reach a different conclusion on remand, and the equities clearly favor a GVR order.

If the Court of Appeals here, in its summary affirmance, did not rely on the Government's primary argument and the lower court's basic premise—that *Pioneer* did not apply—it does not seem to us that we place an excessive burden on it, relative to Stutson's liberty and due process interests, by inviting it to clarify its ambiguous ruling. A contrary approach would risk effectively immunizing summary dispositions by Courts of Appeals from our review, since it is rare that their basis for decision is entirely unambiguous. See *Lawrence, ante*, at 7 (discussing *Netherland* v. *Tuggle*, 515 U. S. ___ (Sept. 14, 1995)). If, on the other hand, the Court of Appeals did not fully consider the applicability of *Pioneer*, or if it concluded that *Pioneer* does not apply under Rule 4, it might well conclude that while "the law is the law," *post*, at 9 (SCALIA, J., dissenting), the combination of the Government's change of position and the subsequent contrary decisions of four other Courts

of Appeals shed light on the law applicable to this case. If it continues to conclude that *Pioneer* does not apply, it will be useful for us to have the benefit of its views so that we may resolve the resulting conflict between the Circuits.

Finally, it is not insignificant that this is a criminal case. When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated. We have previously refused to allow technicalities which caused no prejudice to the prosecution to preclude a remand under 28 U. S. C. §2106 (1988 ed.) "in the interests of justice." *Wood* v. *Georgia*, 450 U. S. 261, 265, n. 5 (1981). And procedural accommodations to prisoners are a familiar aspect of our jurisprudence. See, *e.g.*, 28 U. S. C. §2255 (1988 ed.) (habeas review in spite of an adverse final appellate decision); *Evitts* v. *Lucey*, 469 U. S. 387 (1985) (relief for ineffective assistance of retained counsel on appeal); *Schacht* v. *United States*, 398 U. S. 58, 63–64 (1970) (unlike in civil cases, time limits for petitions for certiorari in criminal cases are not jurisdictional). To the extent that the dissent suggests that it is inconsistent with our "traditional practice," *post*, at 2 (SCALIA, J., dissenting), to call upon a Court of Appeals to reconsider its dismissal of a prisoner's appeal because his lawyer filed it one day late, in circumstances where the Court of Appeals' decision may have been premised on the assumption, unanimously rejected by other Courts of Appeals, that more stringent rules as to filing deadlines apply to prisoners than to creditors filing claims in a bankruptcy proceeding, we must respectfully disagree.

Judicial efficiency and finality are important values, and our GVR power should not be exercised for "[m]ere convenience," cf. *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 274 (1942). "But dry formalism should not sterilize procedural resources which Congress has made available to the federal courts." *Ibid.* In this case, as in *Lawrence* v. *Chater*, a GVR order guarantees to the petitioner full and fair consideration of his rights in light of all pertinent considerations, and is also satisfactory to the Government. In this case, as in *Lawrence*, a GVR order both promotes fairness and respects the dignity of the Court of Appeals by enabling it to consider potentially relevant decisions and arguments that were not previously before it.

Accordingly, the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 507 U. S. 380 (1993).

SUPREME COURT OF THE UNITED STATES

94–8988 ANTHONY LEO STUTSON
v.
UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

94–9323 ALEXIS LAWRENCE, GUARDIAN AND NEXT FRIEND ON BEHALF OF KEMMERLYN D. LAWRENCE, A MINOR
v.
SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 94–8988 AND 94–9323. Decided January 8, 1996

JUSTICE STEVENS, concurring.

The Court persuasively explains why we have "the power to remand to a lower federal court any case raising a federal issue which is properly before us in our appellate capacity." No. 94–9323, at 3. That conclusion comports with a primary characteristic—and, I believe, virtue—of our discretionary authority to manage our certiorari docket: our ability to apply the "totality-of-the-circumstances" approach that JUSTICE SCALIA finds objectionable. *Post*, at 15. The Court's wise disposition of these petitions falls squarely within the best traditions of its administration of that docket. I therefore join the Court's opinions.

SUPREME COURT OF THE UNITED STATES

94–8988 ANTHONY LEO STUTSON
v.
UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

94–9323 ALEXIS LAWRENCE, GUARDIAN AND NEXT FRIEND ON BEHALF OF KEMMERLYN D. LAWRENCE, A MINOR
v.
SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 94–8988 AND 94–9323. Decided January 8, 1996.

CHIEF JUSTICE REHNQUIST, concurring in No. 94–9323 and dissenting in No. 94–8988.

I agree, for the reasons given by JUSTICE SCALIA, that the Court is mistaken in vacating the judgment in No. 94–8988, *Stutson* v. *United States*. I also agree with much of the rest of JUSTICE SCALIA's dissent, but I do not agree with that portion *post*, at 3–4, dealing with what he describes as "situations calling forth the special deference owed to state law and state courts in our system of federalism." Of the three cases which he cites for this proposition, one, *Missouri ex rel. Wabash R. Co.* v. *Public Serv. Comm'n*, 273 U. S. 126 (1927), came to this Court on writ of error and therefore was required to be decided on the merits. The second, *State Farm Mut. Automobile Ins. Co.* v. *Duel*, 324 U. S. 154 (1945), came to us on appeal from a State Supreme Court, and was thus also required to be decided on the merits. The third, *Huddleston* v. *Dwyer*, 322 U. S. 232 (1944), was

a case in which certiorari had already been granted, and the case argued on the merits. None of them, then, involved a choice between denying certiorari, on the one hand, and simply vacating the judgment of the lower court without any opinion, on the other. Vacating a judgment without explanation when the alternative is to simply deny certiorari involves at best the correction of perceived error made by the lower courts. In this connection, we would do well to bear in mind the admonition of Chief Justice William Howard Taft, one of the architects of the Certiorari Act of 1925, as described by his biographer:

> "It was vital, he said in opening his drive for the Judges' bill, that cases before the Court be reduced without limiting the function of pronouncing 'the last word on every important issue under the Constitution and the statutes of the United States.' A Supreme Court, on the other hand, should not be a tribunal obligated to weigh justice among contesting parties.
>
> 'They have had all they have a right to claim,' Taft said, 'when they have had two courts in which to have adjudicated their controversy.'" 2 H. Pringle, The Life and Times of William Howard Taft 997–998 (1939).

I agree with the decision announced in the *per curiam* to vacate the judgment of the Court of Appeals for the Fourth Circuit in No. 94–9323, *Lawrence* v. *Chater*. Whether or not the change of position by the Social Security Administration is "cognizable," in the words of JUSTICE SCALIA, *post*, at 11, it is perfectly reasonable to request the Court of Appeals to answer that question in the first instance.

SUPREME COURT OF THE UNITED STATES

94–8988 (1) ANTHONY LEO STUTSON
v.
UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

94–9323 (1) ALEXIS LAWRENCE, GUARDIAN AND NEXT FRIEND ON BEHALF OF KEMMERLYN D. LAWRENCE, A MINOR
v.
SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 94–8988 AND 94–9323. Decided January 8, 1996.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I dissent because I believe that the dispositions in both No. 94–8988 and No. 94–9323 are improper extensions of our limited power to vacate without first finding error below.

It sometimes occurs that, after having considered the lower court decision and found error, an appellate court merely reverses or vacates and then remands—that is, it sets the judgment aside and sends the case back to the lower court for further proceedings, rather than entering or directing entry of judgment for the appellant or petitioner. That is the appropriate course whenever the finding of error does not automatically entitle the appellant or petitioner to judgment, and the appellate court cannot conduct (or chooses not to conduct) the further inquiry necessary to resolve the questions remaining in the litigation. Our books are full of such

16 pp

cases, from *Glass* v. *Sloop Betsey*, 3 Dall. 6 (1794), and *Clarke* v. *Russel*, 3 Dall. 415 (1799), to *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. ___ (1995), and *Tuggle* v. *Netherland*, 516 U. S. ___ (1995).

What is at issue here, however, is a different sort of creature, which might be called "no-fault V&R": vacation of a judgment and remand *without* any determination of error in the judgment below. In our discretionary certiorari system of review, such an order has acquired the acronym "GVR"—for the Court *grants* certiorari, *vacates* the judgment below, and *remands* for further proceedings.[1] The question presented by today's cases is whether there is any limitation (other than the mandate "do what is fair") upon this practice. The Court's *per curiam* opinions answer "no"; I disagree.

Title 28 U. S. C. §2106 provides that "[t]he Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." This facially unlimited statutory text is subject to the implicit limitations imposed by traditional practice and by the nature of the appellate system created by the Constitution and laws of the United States. The inferior federal courts (to say nothing of state courts) are not the creatures and agents

[1] I emphasize that what is at issue here is our power to set aside a valid judgment—*not*, as JUSTICE STEVENS' concurrence would have it, "our discretionary authority to manage our certiorari docket." *Ante*, at 1. We do the latter by accepting or declining review. But "[w]henever this Court grants certiorari and vacates a court of appeals judgment in order to allow that court to reconsider its decision . . . , the Court *is acting on the merits*." *Board of Trustees of Keene State College* v. *Sweeney*, 439 U. S. 24, 25–26 (1978) (STEVENS, J., dissenting) (emphasis added). Thus, today's orders go far beyond what JUSTICE STEVENS now refers to as "administration of [our certiorari] docket." *Ante*, at 1.

of this body—as are Masters, whose work we may reject and send back for redoing at our own pleasure. Inferior courts are separately authorized in the Constitution, see Art. I, §8; Art. III, §1, created by Acts of Congress, see, *e.g.*, Judiciary Act of 1789, 1 Stat. 73; Evarts Act, Act of Mar. 3, 1891, 26 Stat. 826, and staffed by judges whose manner of appointment and tenure of office are the same as our own, see U. S. Const., Art. II, §2; Art. III, §1; 28 U. S. C. §§44, 133, 134. Despite the unqualified language of §2106, we cannot, for example, "reverse" a judgment of one of these courts "and direct the entry" of a different judgment whenever we disagree with what has been done, but only when we can identify a controlling error of law. And I think we cannot "vacate" and "remand" in the circumstances here.

The Court today seeks to portray our "no-fault V&R" practice as traditionally covering a kaleidoscopic diversity of situations. See No. 94–9323, at 3–4. That is in my view a misportrayal; the practice has always been limited to a few discrete categories of cases. It began, apparently, in situations calling forth the special deference owed to state law and state courts in our system of federalism. In *Missouri ex rel. Wabash R. Co.* v. *Public Serv. Comm'n*, 273 U. S. 126 (1927), for example, rather than find error on the basis of the federal constitutional claims raised, this Court set aside the judgment of the Missouri Supreme Court and remanded the case to that court for further proceedings so that it could consider the meaning and effect of a state statute that had been enacted after its judgment had been entered. We reasoned that "[w]hile this Court may decide these [state-law] questions, it is not obliged to do so, and in view of their nature, we deem it appropriate to refer the determination to the state court." *Id.*, at 131. In other words, we left it to the state court to decide the effect of the intervening event, rather than follow our usual practice of deciding that question for ourselves, see, *e.g.*, *Steamship Co.* v. *Joliffe*, 2 Wall. 450, 456–458 (1865). See generally *United*

States v. *Schooner Peggy*, 1 Cranch 103, 110 (1801) ("if, subsequent to the judgment [entered by a lower court], and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied"). Later cases took the same deferential approach to state courts when the intervening event consisted of one of our own opinions. See, *e.g.*, *State Tax Comm'n* v. *Van Cott*, 306 U. S. 511 (1939). By 1945, we could state that it was "[a] customary procedure" for the Court "to vacate the judgment of [a] state court where there has been a supervening event since its rendition which alters the basis upon which the judgment rests, and to remand the case so that the court from which it came might reconsider the question in light of the changed circumstances." *State Farm Mut. Automobile Ins. Co.* v. *Duel*, 324 U. S. 154, 161 (1945). Similarly, where a federal court of appeals' decision on a point of state law had been cast in doubt by an intervening state supreme court decision, it became our practice to vacate and remand so that the question could be decided by judges "familiar with the intricacies and trends of local law and practice." *Huddleston* v. *Dwyer*, 322 U. S. 232, 237 (1944).

The "intervening event" branch of our "no-fault V&R" practice has been extended to the seemingly analogous situation (though *not* one implicating the special needs of federalism) in which an intervening event (ordinarily a postjudgment decision of this Court) has cast doubt on the judgment rendered by a lower federal court or a state court concerning a *federal* question. See, *e.g.*, *Amer* v. *Superior Court of Cal., County of Los Angeles*, 334 U. S. 813 (1948); *Goldbaum* v. *United States*, 348 U. S. 905 (1955); *Henry* v. *City of Rock Hill*, 376 U. S. 776 (1964). This is undoubtedly the largest category of "GVRs" that now exists. See, *e.g.*, *Exxon Corp.* v. *Youell*, 516 U. S. ___ (1995); *Kapoor* v. *United States*, 516 U. S. ___ (1995); *Edmond* v. *United States*, 516 U. S. ___ (1995); *Pacesetter Constr. Co.* v. *Carpenters 46 Northern Cal. Ctys. Conference Bd.*, 516 U. S. ___ (1995); *Doctor's Assocs., Inc.* v. *Casarotto*, 515 U. S. ___ (1995); *Calamia* v. *Singletary*, 514 U. S. ___ (1995). We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted *in order that* (if appropriate) they may be "GVR'd" when the case is decided. More recently, we have indulged in the practice of vacating and remanding in light of a decision of ours that *preceded* the judgment in question, but by so little time that the lower court might have been unaware of it. See, *e.g.*, *Grier* v. *United States*, 419 U. S. 989 (1974). These applications of "no-fault V&R" have nothing to do with federalism, but they are appropriate to preserve the operational premise of a multitiered judicial system (viz., that lower courts will have the first opportunity to apply the governing law to the facts) and to avoid the unseemliness of holding judgments to be in error on the basis of law that did not exist when the judgments were rendered below. They thus serve the interests of efficiency and of concern for the dignity of state and lower federal tribunals.

An entirely separate branch of our "no-fault V&R" jurisprudence, but again one that originates in the special needs of federalism, pertains to decisions of state supreme courts that are ambiguous as to whether they rest on state-law or federal-law grounds. Rather than run the risk of improperly reversing a judgment based on state law, we adopted the practice of vacating and remanding so that the state court could make the reasons for its judgment clear. See, *e.g.*, *Minnesota* v. *National Tea Co.*, 309 U. S. 551 (1940); *Department of Mental Hygiene of Cal.* v. *Kirchner*, 380 U. S. 194 (1965).[2]

---

[2] In *Michigan* v. *Long*, 463 U. S. 1032 (1983), we largely supplanted this policy with the rule that state-court decisions discussing federal law will be presumed to be based on federal law unless the

We have "GVR'd" with increasing frequency in recent years on the basis of suggestions or representations made by the Solicitor General. Some of these cases are nothing more than examples of the "intervening-event GVR" discussed above, the Solicitor General pointing out that a case or statute has intervened since the judgment below. See, *e.g.*, *Woods* v. *Durr*, 336 U. S. 941 (1949); *Altiere* v. *United States*, 382 U. S. 367 (1966). We have also announced "no-fault GVRs," however, when there has been no intervening development other than the Solicitor General's confession of error in the judgment. That is a relatively new practice. As recently as 1942 a unanimous Court (two Justices not participating) wrote the following:

> "The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent. But such a confession does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed. . . . Furthermore, our judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of the parties . . . ." *Young* v. *United States*, 315 U. S. 257, 258–259 (1942).

Cf. *U. S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U. S. ___ (1994) (setting aside of a valid judicial judgment should not turn upon agreement of the parties). Many of the early "GVRs" based upon the Government's confession of error appear not to have been "no-fault V&Rs" at all, but rather summary decisions on the merits, with remand for further proceedings. See, *e.g.*, *Chiarella* v. *United States*, 341 U. S. 946 (1951) ("*[u]pon consideration of the record* and the confession of error by the Solicitor General," remanding to the District Court for resentencing) (emphasis added); *Penner* v. *United States*, 399 U. S. 522 (1970) ("[o]n the basis of a confession of error by the Solicitor General and of an independent review of the record," remanding to the District Court "with instructions to dismiss the indictment").

Our recent practice, however, has been to remand in light of the confession of error without determining the merits, leaving it to the lower court to decide if the confession is correct. As late as 1981, the current Chief Justice, joined by Justice White, objected to this practice. See *Mariscal* v. *United States*, 449 U. S. 405, 407 (1981) (REHNQUIST, J., dissenting) ("I harbor serious doubt that our adversary system of justice is well served by . . . routinely vacating judgments which the Solicitor General questions without any independent examination of the merits on our own"). I agree with that position. The practice is by now well entrenched, however. See, *e.g.*, *Reed* v. *United States*, 510 U. S. ___ (1994); *Ramirez* v. *United States*, 510 U. S. ___ (1994). It may be considered a separate category of "no-fault V&R."

Finally (and most questionably) we have in very recent years "GVR'd" where the Solicitor General has *not* conceded error in the judgment below, but has merely acknowledged that the ground, or one of the grounds, on which the lower court relied was mistaken. See, *e.g.*, *Alvarado* v. *United States*, 497 U. S. 543 (1990); *Chappell* v. *United States*, 494 U. S. 1075 (1990). That is in my view a mistaken practice, since we should not assume that a Court of Appeals has adopted a legal position only because the Government supported it.

---

contrary is clear from the face of the opinion. *Id.*, at 1037–1044; see also *Arizona* v. *Evans*, 514 U. S. ___, ___–___ (1995) (reaffirming this approach). But cf. *Capital Cities Media, Inc.* v. *Toole*, 466 U. S. 378 (1984) (post-*Long* decision vacating and remanding for clarification of state supreme court decision rendered without opinion).

Four Justices now sitting on the Court have disapproved this sort of "GVR." See *Alvarado*, *supra*, at 545 (REHNQUIST, C. J., joined by O'CONNOR, SCALIA, and KENNEDY, JJ., dissenting).[3]

Today's cases come within none of these categories of "no-fault V&R," not even the questionable last one. In No. 94–8988, the decision "in light of" which we vacate the judgment and remand, *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 507 U. S. 380 (1993), had been on the books for well more than a year before the Eleventh Circuit announced the judgment under review, and for almost two years before that court denied rehearing. Moreover, the parties *specifically argued* to the Court of Appeals the question whether *Pioneer* established the standard applicable to petitioner's claim of "excusable neglect" under Federal Rule of Appellate Procedure 4(b), with the United States disagreeing with petitioner and taking the position that *Pioneer* was *not* controlling. The Eleventh Circuit ruled against petitioner on the merits of his claim; its one-sentence order contained neither a reference to *Pioneer* nor any suggestion that the court viewed the case as turning on which party's proffered standard was applied.

The United States has now revised its legal position and—though it makes no suggestion that the Court of Appeals' judgment was incorrect—is of the view that *Pioneer does* establish the standard governing

[3]The Court misdescribes my position when it states that I would limit "GVRs" "based on confessions of error that do not purport to concede the whole case" to "cases in which the confession of error concerns a 'legal point on which the lower court explicitly relied.'" No. 94–9323, at 8 (quoting *infra*, at 9). Both the text above and the sentence immediately following the phrase that the Court quotes from my dissent, see *infra*, at 9, make my position clear. The line of distinction I would draw—and the one long established in our practice—is between a respondent's concession of error *in the lower court's judgment* and a respondent's concession of error that goes not to the judgment but merely to an aspect of the reasoning below or of respondent's argument below.

petitioner's claim. But the fact that the party who won below repudiates on certiorari its position on a particular point of law does not give rise to any "intervening," postjudgment factor that must be considered. The law is the law, whatever the parties, including the United States, may have argued. As described above, we have sometimes "GVR'd" where the Government has, while still supporting the judgment in its favor, conceded the error of a legal point on which the lower court explicitly relied. As I have explained, see *supra*, at 7–8, in my view even that practice denies valid judgments the respect to which they are entitled. But the "GVR" in the present case goes still further. We do not know in this case whether the Eleventh Circuit even *agreed* with the Government's position that has now been repudiated; for all we know, the court *applied Pioneer* and found against petitioner under that standard. The judgment is declared invalid because the Eleventh Circuit *might* (or might not) have relied on a standard (non-*Pioneer*) that *might* (or might not) be wrong, that *might* (or might not) have affected the outcome, and that the Eleventh Circuit *might* (or might not) abandon (whether or not it is wrong) because the Government has now abandoned it. This seems to me beyond all reason.

The Court justifies its setting aside of the judgment on the ground that "we [do not] place an excessive burden on [the Eleventh Circuit], relative to [petitioner's] liberty and due process interests, by inviting it to clarify its ambiguous ruling." No. 94–8988, at 3. Vacating for ambiguity may be justifiable, as I have noted, when the ambiguity calls into question our very power to take and decide the case, see *supra*, at 5, and n. 2. But where that power is (as it is here) beyond doubt, it seems to me quite improper to vacate merely in order to get a better idea of whether the case is "worth" granting full review. If this is appropriate with respect to court of appeals' summary dispositions of criminal cases, I see no reason why it is not appropriate with respect to criminal dispositions accompanied by opinions as well. Or, for

that matter, why it is not appropriate for civil cases. "GVR'd for clarification of ____" should become a common form of order, drastically altering the role of this Court. In my view we have no power to make such a tutelary remand, as to a schoolboy made to do his homework again.[4] The Court insists that declining to remand for clarification would risk "immunizing summary dispositions . . . from our review," No. 94–8988, at 3. That is not so. It is fully within our power to review this case, and any other case summarily decided below, by granting certiorari and proceeding to consider the merits; or indeed, where the circumstances warrant, to summarily reverse. Cf. Hellman, "Granted, Vacated, and Remanded"—Shedding Light on a Dark Corner of Supreme Court Practice, 67 Judicature 389, 391–392 (1984) (noting that in the 1970's as the Court's "GVR" practice "increased far beyond what it had been in earlier years," its use of summary reversal based on intervening precedents decreased dramatically).

In No. 94–9323, the Court again "GVRs" because the Government has changed a legal position: the Commissioner of Social Security informs us that she now agrees with petitioner on a preliminary point of law that the Court of Appeals found in the Government's favor. And here again, respondent does not concede that the judgment below was in error, for she "ha[s] not . . . reached a firm conclusion" as to her position on the subsequent point of law that will (if her recantation on the preliminary point is accepted) control the outcome of the case. Brief for Respondent in No. 94–9323, p. 13.[5]

[4] *Netherland* v. *Tuggle*, 515 U. S. ___ (1995), upon which the Court relies, see No. 94–9323, at 6–7, is not to the contrary. That was not a "no-fault V&R," but a reversal of the lower court for abuse of discretion in its entry of a stay order.

[5] Because the Commissioner is not prepared to say that she disagrees with petitioner as to the proper disposition of this case, it is questionable whether any case or controversy subsists. Quite apart from the other difficulties with the course the Court has chosen, it seems to me we should not permit the Commissioner to trouble the Fourth Circuit again until she makes up her mind on this issue.

There is, however, a special factor in this second case: respondent is an agency head, whose view on the legal point in question is in some circumstances entitled to deference, see *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). If it were clear that respondent's change in position were entitled to deference, I would have no problem with the "GVR"; the new position would then constitute an intervening postjudgment factor whose effect the Court of Appeals should be allowed to consider. But even if we allow deference to an agency view first expressed in pending litigation (as some think we should not, see Anthony, Which Agency Interpretations Should Bind Citizens and the Courts?, 7 Yale J. Reg. 1, 60–61 (1990); cf. Merrill, Judicial Deference to Executive Precedent, 101 Yale L. J. 969, 1023 (1992)), surely a decent concern for those litigating against the Government and for our lower court judges should induce us to disregard, for *Chevron* purposes, a litigating position *first expressed at the certiorari stage*. The United States is the most frequent, and hence the most calculating, of our litigants. If we accord deference in the circumstances here, we can expect the Government to take full advantage of the opportunity to wash out, on certiorari, disadvantageous positions it has embraced below; and we can expect it to focus less of its energy upon getting its position "right" in the Courts of Appeals.

The Court, however, thinks it unnecessary to decide the deference question. It is enough, as the Court sees it, that its summary review has led it to "believe that [the] agency interpretation is reasonably probably entitled to deference and potentially determinative." No. 94–9323, at 9. I do not agree. It seems to me our "intervening-event GVRs" should not be extended to the situation where (1) the intervening event consists of a

party's going back on what it argued to the court of appeals, *and* (2) it is not even certain that the change in position is legally cognizable. That seems to me to accord inadequate respect to the work of our colleagues below. Moreover, it is not clear to me that the question before us (should an agency change of position at the certiorari stage be accorded deference?) *can even be reached* by the Court of Appeals. Surely we do not expect the Court of Appeals to declare our vacation and remand invalid. Thus, the Court of Appeals will have before it the somewhat *different* question whether the agency change of position *before it* is entitled to deference. I suppose it may conclude that, *since* a change of position on certiorari is not entitled to deference, a change of position on a remand triggered by change of position on certiorari is not entitled to deference—but that would assuredly be a convoluted holding. The question of what is permissible on certiorari seems to me peculiarly within the domain of this Court. Since we are in doubt on the deference point in the present case, we should either deny the petition, or grant it and have the deference point argued.

The Court's failure to comprehend why it should make any difference that the Government's changed litigating position may not be entitled to deference, see No. 94–9323, at 9, displays a lamentable lack of appreciation of the concept of adding insult to injury. It is disrespectful enough of a lower court to set its considered judgment aside because the Government has altered the playing field on appeal; it is downright insulting to do so when the Government's bait-and-switch performance *has not for a certainty altered any factor relevant to the decision*. In that situation, at least, we should let the Government live with the consequences of its fickleness or inattention. The Court claims that it would "defeat the purpose of GVR'ing" to determine the deference issue on the merits, since that issue is "based on a circumstance . . . that will not be present in any other case brought under the statute at issue." *Ibid*. That is true

enough (barring the unlikely event that the Government in a later case under this very statute again switches its position at the certiorari stage). But the issue of whether *Chevron* deference should be accorded to a certiorari-stage switch of litigating position is not at all unique to the individual case or bound up with the underlying statute. It always arises, of course, in an individual case involving a particular statute, as do most questions of law. But the issue itself is thoroughly generalizable, and of general importance. In any event, I do not urge that we determine the deference issue on the merits; my vote in these cases is to deny the petitions. Finally, I must remark upon the Court's assertion that we issued "just such a GVR order last Term, without recorded dissent," No. 94–9323, at 10, citing *Schmidt* v. *Espy*, 513 U. S. ___ (1994): It is not customary, but quite rare, to *record* dissents from grants of certiorari, including "GVRs." It would be wrong to conclude from the unsigned order in *Schmidt* that the vote to "GVR" was unanimous, or even close to unanimous. Thus, *Schmidt* does not demonstrate that bait-and-switch-deference "GVRs" are an accepted practice; but the fact that *Schmidt* was apparently the first-ever such "GVR," combined with the fact that the Government is back one Term later for another helping, demonstrates the accuracy of my prediction that the Solicitor General will be quick to take advantage of this new indulgence.

What is more momentous than the Court's judgments in the particular cases before us—each of which extends our prior practice just a little bit—is its expansive expression of the authority that supports those judgments. It acknowledges, to begin with, no constitutional limitation on our power to vacate lower court orders properly brought before us. No. 94–9323, at 3. This presumably means that the constitutional grant of "appellate Jurisdiction" over "Cases . . . arising under [the] Constitution [and] Laws of the United States," Art. III, §2, empowers the Court to vacate a state supreme

court judgment, and remand the case, because it finds the opinion, though arguably correct, incomplete and unworkmanlike; or because it observes that there has been a postjudgment change in the personnel of the state supreme court, and wishes to give the new state justices a shot at the case. I think that is not so. When the Constitution divides our jurisdiction into "original Jurisdiction" and "appellate Jurisdiction," I think it conveys, with respect to the latter, the traditional accoutrements of appellate power. There doubtless is room for some innovation, particularly such as may be necessary to adapt to a novel system of federalism; but the innovation cannot be limitless without altering the nature of the power conferred.

Not only does the Court reject any constitutional limitation upon its power to vacate; it is unwilling to submit to any prudential constraint as well. Even while acknowledging the potential for "unfair[ness] or manipulat[ion]" and professing to agree that "our GVR power should be exercised sparingly," No. 94–9323, at 4, 10, the Court commits to no standard that will control that power, other than that cloak for all excesses, "the equities," *id.*, at 4; see *id.*, at 10, 11–12; No. 94–8988, at 3. We may, as the Court now pronounces, set aside valid judgments not merely when they are wrong, not merely when intervening events require that someone (either the lower court or we) reconsider them on new facts or under new legal criteria, not merely when it is ambiguous whether we have power to review them, not merely when the United States concedes that the judgment below (or one of the points of law relied upon below, or even one of the points of law *possibly* relied upon below) is wrong; but whenever there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." No. 94–9323, at 4. The power to "revis[e] and correc[t]" for error, *Marbury* v. *Madison*, 1 Cranch 137, 175 (1803), has become a power to void for suspicion. Comparing the

modest origins of the Court's "no-fault V&R" policy with today's expansive *dénouement* should make even the most Pollyannish reformer believe in camel's noses, wedges, and slippery slopes.

The Court justifies its approach on the ground that it "alleviates the potential for unequal treatment that is inherent in our inability to grant plenary review of all pending cases raising similar issues." No. 94–9323, at 4 (internal quotation marks omitted). I do not see how it can promote equal treatment to announce a practice that we cannot possibly pursue in every case. If we were to plumb the "equities" and ponder the "errors" for all the petitions that come before us—if we were to conduct, for example, in all cases involving summary decisions, today's balancing of the "burden" to the Court of Appeals against the litigant's "interests" in having clarification of the ruling, see No. 94–8988, at 3, or today's calculation of "the overall probabilities and equities," No. 94–9323, at 10—we would have no time left for the cases we grant to consider on the merits. Of course we do not *purport* to conduct such inquiries, not even the basic one of whether the decision below is probably in "error"—which is why we insist that our denial of certiorari does not suggest a view on the merits, see, *e.g.*, *Teague* v. *Lane*, 489 U. S. 288, 296 (1989); *Singleton* v. *Commissioner*, 439 U. S. 942 (1978) (STEVENS, J., respecting the denial of the petition for writ of certiorari). Moreover, even if we tried applying the Court's "totality-of-the-circumstances" evaluation to all the petitions coming before us, we would be unlikely to achieve equal treatment. Such a plastic criterion is liable to produce inconsistent results in any series of decisions; it is virtually *guaranteed* to do so in a series of decisions made without benefit of adversary presentation (whether we should "GVR" is rarely briefed, much less argued—as it has not been here) and announced without accompaniment of a judicial opinion (we almost never give reasons as the Court has done today). The need to afford equal treatment argues precisely *against*

the "totality-of-the-circumstances" approach embraced by the Court, and in favor of a more modest but standardized "GVR" practice.

Henceforth, I shall vote for an order granting certiorari, vacating the judgment below without determination of the merits, and remanding for further consideration, only (1) where an intervening factor has arisen that has a legal bearing upon the decision, (2) where, in a context not governed by *Michigan* v. *Long*, 463 U. S. 1032 (1983), clarification of the opinion below is needed to assure our jurisdiction, and (3) (in acknowledgment of established practice, though not necessarily in agreement with its validity) where the respondent or appellee confesses error in the judgment below. (I shall not necessarily note my dissent from "GVRs" where those conditions do not exist.) As I have discussed, neither of the present cases meets these standards. Accordingly, I respectfully dissent from today's orders and would deny both petitions.

SUPREME COURT OF THE UNITED STATES

94–8988 ANTHONY LEO STUTSON
v.
UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

94–9323 ALEXIS LAWRENCE, GUARDIAN AND NEXT FRIEND ON BEHALF OF KEMMERLYN D. LAWRENCE, A MINOR
v.
SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 94–8988 AND 94–9323. Decided January 8, 1996

JUSTICE STEVENS, concurring.

The Court persuasively explains why we have "the power to remand to a lower federal court any case raising a federal issue which is properly before us in our appellate capacity." No. 94–9323, at 3. That conclusion comports with a primary characteristic—and, I believe, virtue—of our discretionary authority to manage our certiorari docket: our ability to apply the "totality-of-the-circumstances" approach that JUSTICE SCALIA finds objectionable. *Post,* at 15. The Court's wise disposition of these petitions falls squarely within the best traditions of its administration of that docket. I therefore join the Court's opinions.

SUPREME COURT OF THE UNITED STATES

94–8988 (9) ANTHONY LEO STUTSON
v.
UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

94–9323 (9) ALEXIS LAWRENCE, GUARDIAN AND NEXT FRIEND ON BEHALF OF KEMMERLYN D. LAWRENCE, A MINOR
v.
SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 94–8988 AND 94–9323. Decided January 8, 1996.

CHIEF JUSTICE REHNQUIST, concurring in No. 94–9323 and dissenting in No. 94–8988.

I agree, for the reasons given by JUSTICE SCALIA, that the Court is mistaken in vacating the judgment in No. 94–8988, *Stutson* v. *United States*. I also agree with much of the rest of JUSTICE SCALIA's dissent, but I do not agree with that portion *post*, at 3–4, dealing with what he describes as "situations calling forth the special deference owed to state law and state courts in our system of federalism." Of the three cases which he cites for this proposition, one, *Missouri ex rel. Wabash R. Co.* v. *Public Serv. Comm'n*, 273 U. S. 126 (1927), came to this Court on writ of error and therefore was required to be decided on the merits. The second, *State Farm Mut. Automobile Ins. Co.* v. *Duel*, 324 U. S. 154 (1945), came to us on appeal from a State Supreme Court, and was thus also required to be decided on the merits. The third, *Huddleston* v. *Dwyer*, 322 U. S. 232 (1944), was

2 pp

a case in which certiorari had already been granted, and the case argued on the merits. None of them, then, involved a choice between denying certiorari, on the one hand, and simply vacating the judgment of the lower court without any opinion, on the other. Vacating a judgment without explanation when the alternative is to simply deny certiorari involves at best the correction of perceived error made by the lower courts. In this connection, we would do well to bear in mind the admonition of Chief Justice William Howard Taft, one of the architects of the Certiorari Act of 1925, as described by his biographer:

> "It was vital, he said in opening his drive for the Judges' bill, that cases before the Court be reduced without limiting the function of pronouncing 'the last word on every important issue under the Constitution and the statutes of the United States.' A Supreme Court, on the other hand, should not be a tribunal obligated to weigh justice among contesting parties.
>
> 'They have had all they have a right to claim,' Taft said, 'when they have had two courts in which to have adjudicated their controversy.'" 2 H. Pringle, The Life and Times of William Howard Taft 997–998 (1939).

I agree with the decision announced in the *per curiam* to vacate the judgment of the Court of Appeals for the Fourth Circuit in No. 94–9323, *Lawrence* v. *Chater*. Whether or not the change of position by the Social Security Administration is "cognizable," in the words of JUSTICE SCALIA, *post*, at 11, it is perfectly reasonable to request the Court of Appeals to answer that question in the first instance.

SUPREME COURT OF THE UNITED STATES

94–8988 (10) ANTHONY LEO STUTSON
v.
UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

94–9323 (10) ALEXIS LAWRENCE, GUARDIAN AND NEXT FRIEND ON BEHALF OF KEMMERLYN D. LAWRENCE, A MINOR
v.
SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 94–8988 AND 94–9323. Decided January 8, 1996.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I dissent because I believe that the dispositions in both No. 94–8988 and No. 94–9323 are improper extensions of our limited power to vacate without first finding error below.

It sometimes occurs that, after having considered the lower court decision and found error, an appellate court merely reverses or vacates and then remands—that is, it sets the judgment aside and sends the case back to the lower court for further proceedings, rather than entering or directing entry of judgment for the appellant or petitioner. That is the appropriate course whenever the finding of error does not automatically entitle the appellant or petitioner to judgment, and the appellate court cannot conduct (or chooses not to conduct) the further inquiry necessary to resolve the questions remaining in the litigation. Our books are full of such

16 pp

cases, from *Glass* v. *Sloop Betsey*, 3 Dall. 6 (1794), and *Clarke* v. *Russel*, 3 Dall. 415 (1799), to *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. ___ (1995), and *Tuggle* v. *Netherland*, 516 U. S. ___ (1995).

What is at issue here, however, is a different sort of creature, which might be called "no-fault V&R": vacation of a judgment and remand *without* any determination of error in the judgment below. In our discretionary certiorari system of review, such an order has acquired the acronym "GVR"—for the Court *grants* certiorari, *vacates* the judgment below, and *remands* for further proceedings.[1] The question presented by today's cases is whether there is any limitation (other than the mandate "do what is fair") upon this practice. The Court's *per curiam* opinions answer "no"; I disagree.

Title 28 U. S. C. §2106 provides that "[t]he Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." This facially unlimited statutory text is subject to the implicit limitations imposed by traditional practice and by the nature of the appellate system created by the Constitution and laws of the United States. The inferior federal courts (to say nothing of state courts) are not the creatures and agents

[1] I emphasize that what is at issue here is our power to set aside a valid judgment—*not*, as JUSTICE STEVENS' concurrence would have it, "our discretionary authority to manage our certiorari docket." *Ante*, at 1. We do the latter by accepting or declining review. But "[w]henever this Court grants certiorari and vacates a court of appeals judgment in order to allow that court to reconsider its decision . . . , the Court *is acting on the merits*." *Board of Trustees of Keene State College* v. *Sweeney*, 439 U. S. 24, 25–26 (1978) (STEVENS, J., dissenting) (emphasis added). Thus, today's orders go far beyond what JUSTICE STEVENS now refers to as "administration of [our certiorari] docket." *Ante*, at 1.

of this body—as are Masters, whose work we may reject and send back for redoing at our own pleasure. Inferior courts are separately authorized in the Constitution, see Art. I, §8; Art. III, §1, created by Acts of Congress, see, *e.g.*, Judiciary Act of 1789, 1 Stat. 73; Evarts Act, Act of Mar. 3, 1891, 26 Stat. 826, and staffed by judges whose manner of appointment and tenure of office are the same as our own, see U. S. Const., Art. II, §2; Art. III, §1; 28 U. S. C. §§44, 133, 134. Despite the unqualified language of §2106, we cannot, for example, "reverse" a judgment of one of these courts "and direct the entry" of a different judgment whenever we disagree with what has been done, but only when we can identify a controlling error of law. And I think we cannot "vacate" and "remand" in the circumstances here.

The Court today seeks to portray our "no-fault V&R" practice as traditionally covering a kaleidoscopic diversity of situations. See No. 94–9323, at 3–4. That is in my view a misportrayal; the practice has always been limited to a few discrete categories of cases. It began, apparently, in situations calling forth the special deference owed to state law and state courts in our system of federalism. In *Missouri ex rel. Wabash R. Co.* v. *Public Serv. Comm'n*, 273 U. S. 126 (1927), for example, rather than find error on the basis of the federal constitutional claims raised, this Court set aside the judgment of the Missouri Supreme Court and remanded the case to that court for further proceedings so that it could consider the meaning and effect of a state statute that had been enacted after its judgment had been entered. We reasoned that "[w]hile this Court may decide these [state-law] questions, it is not obliged to do so, and in view of their nature, we deem it appropriate to refer the determination to the state court." *Id.*, at 131. In other words, we left it to the state court to decide the effect of the intervening event, rather than follow our usual practice of deciding that question for ourselves, see, *e.g.*, *Steamship Co.* v. *Joliffe*, 2 Wall. 450, 456–458 (1865). See generally *United*

States v. *Schooner Peggy*, 1 Cranch 103, 110 (1801) ("if, subsequent to the judgment [entered by a lower court], and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied"). Later cases took the same deferential approach to state courts when the intervening event consisted of one of our own opinions. See, *e.g.*, *State Tax Comm'n* v. *Van Cott*, 306 U. S. 511 (1939). By 1945, we could state that it was "[a] customary procedure" for the Court "to vacate the judgment of [a] state court where there has been a supervening event since its rendition which alters the basis upon which the judgment rests, and to remand the case so that the court from which it came might reconsider the question in light of the changed circumstances." *State Farm Mut. Automobile Ins. Co.* v. *Duel*, 324 U. S. 154, 161 (1945). Similarly, where a federal court of appeals' decision on a point of state law had been cast in doubt by an intervening state supreme court decision, it became our practice to vacate and remand so that the question could be decided by judges "familiar with the intricacies and trends of local law and practice." *Huddleston* v. *Dwyer*, 322 U. S. 232, 237 (1944).

The "intervening event" branch of our "no-fault V&R" practice has been extended to the seemingly analogous situation (though *not* one implicating the special needs of federalism) in which an intervening event (ordinarily a postjudgment decision of this Court) has cast doubt on the judgment rendered by a lower federal court or a state court concerning a *federal* question. See, *e.g.*, *Amer* v. *Superior Court of Cal., County of Los Angeles*, 334 U. S. 813 (1948); *Goldbaum* v. *United States*, 348 U. S. 905 (1955); *Henry* v. *City of Rock Hill*, 376 U. S. 776 (1964). This is undoubtedly the largest category of "GVRs" that now exists. See, *e.g.*, *Exxon Corp.* v. *Youell*, 516 U. S. ___ (1995); *Kapoor* v. *United States*, 516 U. S. ___ (1995); *Edmond* v. *United States*, 516 U. S. ___ (1995); *Pacesetter Constr. Co.* v. *Carpenters 46 Northern Cal. Ctys. Conference Bd.*, 516 U. S. ___ (1995); *Doctor's Assocs., Inc.* v. *Casarotto*, 515 U. S. ___ (1995); *Calamia* v. *Singletary*, 514 U. S. ___ (1995). We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted *in order that* (if appropriate) they may be "GVR'd" when the case is decided. More recently, we have indulged in the practice of vacating and remanding in light of a decision of ours that *preceded* the judgment in question, but by so little time that the lower court might have been unaware of it. See, *e.g.*, *Grier* v. *United States*, 419 U. S. 989 (1974). These applications of "no-fault V&R" have nothing to do with federalism, but they are appropriate to preserve the operational premise of a multitiered judicial system (viz., that lower courts will have the first opportunity to apply the governing law to the facts) and to avoid the unseemliness of holding judgments to be in error on the basis of law that did not exist when the judgments were rendered below. They thus serve the interests of efficiency and of concern for the dignity of state and lower federal tribunals.

An entirely separate branch of our "no-fault V&R" jurisprudence, but again one that originates in the special needs of federalism, pertains to decisions of state supreme courts that are ambiguous as to whether they rest on state-law or federal-law grounds. Rather than run the risk of improperly reversing a judgment based on state law, we adopted the practice of vacating and remanding so that the state court could make the reasons for its judgment clear. See, *e.g.*, *Minnesota* v. *National Tea Co.*, 309 U. S. 551 (1940); *Department of Mental Hygiene of Cal.* v. *Kirchner*, 380 U. S. 194 (1965).[2]

---

[2]In *Michigan* v. *Long*, 463 U. S. 1032 (1983), we largely supplanted this policy with the rule that state-court decisions discussing federal law will be presumed to be based on federal law unless the

We have "GVR'd" with increasing frequency in recent years on the basis of suggestions or representations made by the Solicitor General. Some of these cases are nothing more than examples of the "intervening-event GVR" discussed above, the Solicitor General pointing out that a case or statute has intervened since the judgment below. See, *e.g.*, *Woods* v. *Durr*, 336 U. S. 941 (1949); *Altiere* v. *United States*, 382 U. S. 367 (1966). We have also announced "no-fault GVRs," however, when there has been no intervening development other than the Solicitor General's confession of error in the judgment. That is a relatively new practice. As recently as 1942 a unanimous Court (two Justices not participating) wrote the following:

> "The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent. But such a confession does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed. . . . Furthermore, our judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of the parties . . . ." *Young* v. *United States*, 315 U. S. 257, 258–259 (1942).

Cf. *U. S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U. S. ___ (1994) (setting aside of a valid judicial judgment should not turn upon agreement of the parties). Many of the early "GVRs" based upon the Government's confession of error appear not to have been "no-fault V&Rs" at all, but rather summary decisions on the merits, with remand for further proceedings. See, *e.g.*, *Chiarella* v. *United States*, 341 U. S. 946 (1951) ("*[u]pon consideration of the record* and the confession of error by the Solicitor General," remanding to the District Court for resentencing) (emphasis added); *Penner* v. *United States*, 399 U. S. 522 (1970) ("[o]n the basis of a confession of error by the Solicitor General and of an independent review of the record," remanding to the District Court "with instructions to dismiss the indictment").

Our recent practice, however, has been to remand in light of the confession of error without determining the merits, leaving it to the lower court to decide if the confession is correct. As late as 1981, the current Chief Justice, joined by Justice White, objected to this practice. See *Mariscal* v. *United States*, 449 U. S. 405, 407 (1981) (REHNQUIST, J., dissenting) ("I harbor serious doubt that our adversary system of justice is well served by . . . routinely vacating judgments which the Solicitor General questions without any independent examination of the merits on our own"). I agree with that position. The practice is by now well entrenched, however. See, *e.g.*, *Reed* v. *United States*, 510 U. S. ___ (1994); *Ramirez* v. *United States*, 510 U. S. ___ (1994). It may be considered a separate category of "no-fault V&R."

Finally (and most questionably) we have in very recent years "GVR'd" where the Solicitor General has *not* conceded error in the judgment below, but has merely acknowledged that the ground, or one of the grounds, on which the lower court relied was mistaken. See, *e.g.*, *Alvarado* v. *United States*, 497 U. S. 543 (1990); *Chappell* v. *United States*, 494 U. S. 1075 (1990). That is in my view a mistaken practice, since we should not assume that a Court of Appeals has adopted a legal position only because the Government supported it.

---

contrary is clear from the face of the opinion. *Id.*, at 1037–1044; see also *Arizona* v. *Evans*, 514 U. S. ___, ___–___ (1995) (reaffirming this approach). But cf. *Capital Cities Media, Inc.* v. *Toole*, 466 U. S. 378 (1984) (post-*Long* decision vacating and remanding for clarification of state supreme court decision rendered without opinion).

Four Justices now sitting on the Court have disapproved this sort of "GVR." See *Alvarado*, *supra*, at 545 (REHNQUIST, C. J., joined by O'CONNOR, SCALIA, and KENNEDY, JJ., dissenting).[3]

Today's cases come within none of these categories of "no-fault V&R," not even the questionable last one. In No. 94–8988, the decision "in light of" which we vacate the judgment and remand, *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 507 U. S. 380 (1993), had been on the books for well more than a year before the Eleventh Circuit announced the judgment under review, and for almost two years before that court denied rehearing. Moreover, the parties *specifically argued* to the Court of Appeals the question whether *Pioneer* established the standard applicable to petitioner's claim of "excusable neglect" under Federal Rule of Appellate Procedure 4(b), with the United States disagreeing with petitioner and taking the position that *Pioneer* was *not* controlling. The Eleventh Circuit ruled against petitioner on the merits of his claim; its one-sentence order contained neither a reference to *Pioneer* nor any suggestion that the court viewed the case as turning on which party's proffered standard was applied.

The United States has now revised its legal position and—though it makes no suggestion that the Court of Appeals' judgment was incorrect—is of the view that *Pioneer does* establish the standard governing

[3]The Court misdescribes my position when it states that I would limit "GVRs" "based on confessions of error that do not purport to concede the whole case" to "cases in which the confession of error concerns a 'legal point on which the lower court explicitly relied.'" No. 94–9323, at 8 (quoting *infra*, at 9). Both the text above and the sentence immediately following the phrase that the Court quotes from my dissent, see *infra*, at 9, make my position clear. The line of distinction I would draw—and the one long established in our practice—is between a respondent's concession of error *in the lower court's judgment* and a respondent's concession of error that goes not to the judgment but merely to an aspect of the reasoning below or of respondent's argument below.

petitioner's claim. But the fact that the party who won below repudiates on certiorari its position on a particular point of law does not give rise to any "intervening," postjudgment factor that must be considered. The law is the law, whatever the parties, including the United States, may have argued. As described above, we have sometimes "GVR'd" where the Government has, while still supporting the judgment in its favor, conceded the error of a legal point on which the lower court explicitly relied. As I have explained, see *supra*, at 7–8, in my view even that practice denies valid judgments the respect to which they are entitled. But the "GVR" in the present case goes still further. We do not know in this case whether the Eleventh Circuit even *agreed* with the Government's position that has now been repudiated; for all we know, the court *applied Pioneer* and found against petitioner under that standard. The judgment is declared invalid because the Eleventh Circuit *might* (or might not) have relied on a standard (non-*Pioneer*) that *might* (or might not) be wrong, that *might* (or might not) have affected the outcome, and that the Eleventh Circuit *might* (or might not) abandon (whether or not it is wrong) because the Government has now abandoned it. This seems to me beyond all reason.

The Court justifies its setting aside of the judgment on the ground that "we [do not] place an excessive burden on [the Eleventh Circuit], relative to [petitioner's] liberty and due process interests, by inviting it to clarify its ambiguous ruling." No. 94–8988, at 3. Vacating for ambiguity may be justifiable, as I have noted, when the ambiguity calls into question our very power to take and decide the case, see *supra*, at 5, and n. 2. But where that power is (as it is here) beyond doubt, it seems to me quite improper to vacate merely in order to get a better idea of whether the case is "worth" granting full review. If this is appropriate with respect to court of appeals' summary dispositions of criminal cases, I see no reason why it is not appropriate with respect to criminal dispositions accompanied by opinions as well. Or, for

that matter, why it is not appropriate for civil cases. "GVR'd for clarification of _____" should become a common form of order, drastically altering the role of this Court. In my view we have no power to make such a tutelary remand, as to a schoolboy made to do his homework again.[4] The Court insists that declining to remand for clarification would risk "immunizing summary dispositions . . . from our review," No. 94–8988, at 3. That is not so. It is fully within our power to review this case, and any other case summarily decided below, by granting certiorari and proceeding to consider the merits; or indeed, where the circumstances warrant, to summarily reverse. Cf. Hellman, "Granted, Vacated, and Remanded"—Shedding Light on a Dark Corner of Supreme Court Practice, 67 Judicature 389, 391–392 (1984) (noting that in the 1970's as the Court's "GVR" practice "increased far beyond what it had been in earlier years," its use of summary reversal based on intervening precedents decreased dramatically).

In No. 94–9323, the Court again "GVRs" because the Government has changed a legal position: the Commissioner of Social Security informs us that she now agrees with petitioner on a preliminary point of law that the Court of Appeals found in the Governm[illegible]t's favor. And here again, respondent does not concede that the judgment below was in error, for she "ha[s] not . . . reached a firm conclusion" as to her position on the subsequent point of law that will (if her recantation on the preliminary point is accepted) control the outcome of the case. Brief for Respondent in No. 94–9323, p. 13.[5]

[4] *Netherland* v. *Tuggle*, 515 U. S. ___ (1995), upon which the Court relies, see No. 94–9323, at 6–7, is not to the contrary. That was not a "no-fault V&R," but a reversal of the lower court for abuse of discretion in its entry of a stay order.

[5] Because the Commissioner is not prepared to say that she disagrees with petitioner as to the proper disposition of this case, it is questionable whether any case or controversy subsists. Quite apart from the other difficulties with the course the Court has chosen, it seems to me we should not permit the Commissioner to trouble the Fourth Circuit again until she makes up her mind on this issue.

There is, however, a special factor in this second case: respondent is an agency head, whose view on the legal point in question is in some circumstances entitled to deference, see *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). If it were clear that respondent's change in position were entitled to deference, I would have no problem with the "GVR"; the new position would then constitute an intervening postjudgment factor whose effect the Court of Appeals should be allowed to consider. But even if we allow deference to an agency view first expressed in pending litigation (as some think we should not, see Anthony, Which Agency Interpretations Should Bind Citizens and the Courts?, 7 Yale J. Reg. 1, 60–61 (1990); cf. Merrill, Judicial Deference to Executive Precedent, 101 Yale L. J. 969, 1023 (1992)), surely a decent concern for those litigating against the Government and for our lower court judges should induce us to disregard, for *Chevron* purposes, a litigating position *first expressed at the certiorari stage*. The United States is the most frequent, and hence the most calculating, of our litigants. If we accord deference in the circumstances here, we can expect the Government to take full advantage of the opportunity to wash out, on certiorari, disadvantageous positions it has embraced below; and we can expect it to focus less of its energy upon getting its position "right" in the Courts of Appeals.

The Court, however, thinks it unnecessary to decide the deference question. It is enough, as the Court sees it, that its summary review has led it to "believe that [the] agency interpretation is reasonably probably entitled to deference and potentially determinative." No. 94–9323, at 9. I do not agree. It seems to me our "intervening-event GVRs" should not be extended to the situation where (1) the intervening event consists of a

party's going back on what it argued to the court of appeals, *and* (2) it is not even certain that the change in position is legally cognizable. That seems to me to accord inadequate respect to the work of our colleagues below. Moreover, it is not clear to me that the question before us (should an agency change of position at the certiorari stage be accorded deference?) *can even be reached* by the Court of Appeals. Surely we do not expect the Court of Appeals to declare our vacation and remand invalid. Thus, the Court of Appeals will have before it the somewhat *different* question whether the agency change of position *before it* is entitled to deference. I suppose it may conclude that, *since* a change of position on certiorari is not entitled to deference, a change of position on a remand triggered by change of position on certiorari is not entitled to deference—but that would assuredly be a convoluted holding. The question of what is permissible on certiorari seems to me peculiarly within the domain of this Court. Since we are in doubt on the deference point in the present case, we should either deny the petition, or grant it and have the deference point argued.

The Court's failure to comprehend why it should make any difference that the Government's changed litigating position may not be entitled to deference, see No. 94–9323, at 9, displays a lamentable lack of appreciation of the concept of adding insult to injury. It is disrespectful enough of a lower court to set its considered judgment aside because the Government has altered the playing field on appeal; it is downright insulting to do so when the Government's bait-and-switch performance *has not for a certainty altered any factor relevant to the decision*. In that situation, at least, we should let the Government live with the consequences of its fickleness or inattention. The Court claims that it would "defeat the purpose of GVR'ing" to determine the deference issue on the merits, since that issue is "based on a circumstance . . . that will not be present in any other case brought under the statute at issue." *Ibid*. That is true

enough (barring the unlikely event that the Government in a later case under this very statute again switches its position at the certiorari stage). But the issue of whether *Chevron* deference should be accorded to a certiorari-stage switch of litigating position is not at all unique to the individual case or bound up with the underlying statute. It always arises, of course, in an individual case involving a particular statute, as do most questions of law. But the issue itself is thoroughly generalizable, and of general importance. In any event, I do not urge that we determine the deference issue on the merits; my vote in these cases is to deny the petitions. Finally, I must remark upon the Court's assertion that we issued "just such a GVR order last Term, without recorded dissent," No. 94–9323, at 10, citing *Schmidt* v. *Espy*, 513 U. S. ___ (1994): It is not customary, but quite rare, to *record* dissents from grants of certiorari, including "GVRs." It would be wrong to conclude from the unsigned order in *Schmidt* that the vote to "GVR" was unanimous, or even close to unanimous. Thus, *Schmidt* does not demonstrate that bait-and-switch-deference "GVRs" are an accepted practice; but the fact that *Schmidt* was apparently the first-ever such "GVR," combined with the fact that the Government is back one Term later for another helping, demonstrates the accuracy of my prediction that the Solicitor General will be quick to take advantage of this new indulgence.

What is more momentous than the Court's judgments in the particular cases before us—each of which extends our prior practice just a little bit—is its expansive expression of the authority that supports those judgments. It acknowledges, to begin with, no constitutional limitation on our power to vacate lower court orders properly brought before us. No. 94–9323, at 3. This presumably means that the constitutional grant of "appellate Jurisdiction" over "Cases . . . arising under [the] Constitution [and] Laws of the United States," Art. III, §2, empowers the Court to vacate a state supreme

court judgment, and remand the case, because it finds the opinion, though arguably correct, incomplete and unworkmanlike; or because it observes that there has been a postjudgment change in the personnel of the state supreme court, and wishes to give the new state justices a shot at the case. I think that is not so. When the Constitution divides our jurisdiction into "original Jurisdiction" and "appellate Jurisdiction," I think it conveys, with respect to the latter, the traditional accoutrements of appellate power. There doubtless is room for some innovation, particularly such as may be necessary to adapt to a novel system of federalism; but the innovation cannot be limitless without altering the nature of the power conferred.

Not only does the Court reject any constitutional limitation upon its power to vacate; it is unwilling to submit to any prudential constraint as well. Even while acknowledging the potential for "unfair[ness] or manipulat[ion]" and professing to agree that "our GVR power should be exercised sparingly," No. 94–9323, at 4, 10, the Court commits to no standard that will control that power, other than that cloak for all excesses, "the equities," *id.*, at 4; see *id.*, at 10, 11–12; No. 94–8988, at 3. We may, as the Court now pronounces, set aside valid judgments not merely when they are wrong, not merely when intervening events require that someone (either the lower court or we) reconsider them on new facts or under new legal criteria, not merely when it is ambiguous whether we have power to review them, not merely when the United States concedes that the judgment below (or one of the points of law relied upon below, or even one of the points of law *possibly* relied upon below) is wrong; but whenever there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." No. 94–9323, at 4. The power to "revis[e] and correc[t]" for error, *Marbury* v. *Madison*, 1 Cranch 137, 175 (1803), has become a power to void for suspicion. Comparing the

modest origins of the Court's "no-fault V&R" policy with today's expansive *dénouement* should make even the most Pollyannish reformer believe in camel's noses, wedges, and slippery slopes.

The Court justifies its approach on the ground that it "alleviates the potential for unequal treatment that is inherent in our inability to grant plenary review of all pending cases raising similar issues." No. 94–9323, at 4 (internal quotation marks omitted). I do not see how it can promote equal treatment to announce a practice that we cannot possibly pursue in every case. If we were to plumb the "equities" and ponder the "errors" for all the petitions that come before us—if we were to conduct, for example, in all cases involving summary decisions, today's balancing of the "burden" to the Court of Appeals against the litigant's "interests" in having clarification of the ruling, see No. 94–8988, at 3, or today's calculation of "the overall probabilities and equities," No. 94–9323, at 10—we would have no time left for the cases we grant to consider on the merits. Of course we do not *purport* to conduct such inquiries, not even the basic one of whether the decision below is probably in "error"—which is why we insist that our denial of certiorari does not suggest a view on the merits, see, *e.g.*, *Teague* v. *Lane*, 489 U. S. 288, 296 (1989); *Singleton* v. *Commissioner*, 439 U. S. 942 (1978) (STEVENS, J., respecting the denial of the petition for writ of certiorari). Moreover, even if we tried applying the Court's "totality-of-the-circumstances" evaluation to all the petitions coming before us, we would be unlikely to achieve equal treatment. Such a plastic criterion is liable to produce inconsistent results in any series of decisions; it is virtually *guaranteed* to do so in a series of decisions made without benefit of adversary presentation (whether we should "GVR" is rarely briefed, much less argued—as it has not been here) and announced without accompaniment of a judicial opinion (we almost never give reasons as the Court has done today). The need to afford equal treatment argues precisely *against*

the "totality-of-the-circumstances" approach embraced by the Court, and in favor of a more modest but standardized "GVR" practice.

Henceforth, I shall vote for an order granting certiorari, vacating the judgment below without determination of the merits, and remanding for further consideration, only (1) where an intervening factor has arisen that has a legal bearing upon the decision, (2) where, in a context not governed by *Michigan* v. *Long*, 463 U. S. 1032 (1983), clarification of the opinion below is needed to assure our jurisdiction, and (3) (in acknowledgment of established practice, though not necessarily in agreement with its validity) where the respondent or appellee confesses error in the judgment below. (I shall not necessarily note my dissent from "GVRs" where those conditions do not exist.) As I have discussed, neither of the present cases meets these standards. Accordingly, I respectfully dissent from today's orders and would deny both petitions.